

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + Affidavit of Mailing

77-1071

To be argued by
DAVID GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1071

UNITED STATES OF AMERICA,

Appellee.

—v.—

CHARLES DANIELS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

BERNARD J. FRIED,
DAVID GOULD,
*Assistant United States Attorney
Of Counsel.*

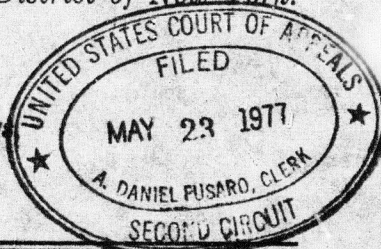




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—v.—

CHARLES DANIELS,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Appellant Charles Daniels appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Pratt, J.) after a jury trial. Appellant was convicted of both counts of an indictment charging him with stealing goods with a value of over \$100 which were moving in interstate commerce (Count One) and receiving and possessing those same goods (Count Two) (18 U.S.C. § 659). Daniels was sentenced to concurrent terms of imprisonment for eight years on each count to be served consecutively to the state sentence for which Daniels is presently incarcerated.

On appeal appellant asserts that his conviction should be reversed and he should be given a new trial because of the alleged incompetency of his trial counsel. He also requests a remand for resentencing before a different judge on the ground that the sentencing judge failed to

consider three documents pertaining to appellant's "rehabilitation".

Statement of Facts

A. Introduction

The Government's evidence in this case showed that on the morning of April 13, 1972, the appellant Charles Daniels and an accomplice, Dan Galvin, hijacked a Nelson Distributors truck loaded with wearing apparel that had left earlier in the day from Secaucus, New Jersey. The truck was hijacked in Jamaica, Queens, just after the truck driver, Thomas Ingram, had backed it away from the loading ramp of a Gertz department store. Daniels and Galvin initially took the truck and unloaded it at the house of a "fence" named Chester Crawford. They later reloaded the goods onto one of Crawford's trucks and drove the load to Camden, New Jersey where the goods were left at a retail men's clothing shop. The next day another "fence", Arnie Sherman, paid them \$5000 for these goods.

Co-conspirators Dan Galvin and Chester Crawford, the truck driver Thomas Ingram, and Jack Rosenberg, the Operations and Claims Manager for Nelson Distributors Inc. were Government witnesses, and Crawford, Galvin, and Ingram made in-court identifications of Daniels. The defendant called no witnesses of his own.

B. The Government's Case

Nelson Distributors whose truck was hijacked, is located in Secaucus, New Jersey, and delivers goods to various chain stores, including the Gertz Department Stores (130).¹ The shipping manifest of the hijacked

¹ All citations are to the trial record unless otherwise noted.

truck showed that on the evening of April 12, 1972, it was loaded with men's and women's wearing apparel (157, 159, 183-184). The following morning, April 13, 1972, at 7:00 A.M. Thomas Ingram, a driver, who had been employed by Nelson for seven years, arrived in Secaucus to drive the truck to three Gertz stores located in New York (338). When he arrived, he saw that the back of the truck was open and that it was packed with clothing (367).

Ingram then drove the truck to the Gertz store located in Jamaica, Queens, and began unloading the truck but was told to back off from the loading dock to make room for a different truck (340-341, 374-375). He did so and parked a short distance from the department store, at which time a black male threw open the door on the passenger side of the truck and, putting his hand on the handle of a revolver, told Ingram to move over or he would be killed (341, 380). Ingram, who put up no resistance, informed the hijacker that the alarm had to be reset before the truck was started. Consequently, Ingram accompanied the hijacker to the back of the truck where Ingram reset the alarm and they then returned to the truck (343).

During the time that Ingram was first accosted to the time he returned to the cab of the truck, a period of about 3 to 4 minutes, he had a clear view of the hijacker, who was not wearing a mask or disguise of any kind (356). Indeed, when the hijacker first appeared, Ingram "looked right at him" (357, 358). At trial, Ingram was able unequivocally to identify Charles Daniels (342, 357, 358).

After resetting the alarm, Ingram found that Dan Galvin, a white male, had entered the driver's side of the truck (343, see also 200-201 [testimony of Dan Galvin]).

Daniels, who instructed Ingram to sit in the front seat between himself and Galvin, then placed a pair of glasses, covered on the inside with dark black tape, over Ingram's eyes and ordered him not to try to look at anything (343). They then drove off (344). As they were riding, Daniels took Ingram's wallet and removed part of his driver's license, telling Ingram that they had his address and if he caused any trouble they would know where to find him (344-345, 202). Meanwhile, Daniels directed Galvin to the final destination, which turned out to be the home of Chester Crawford, a friend of Daniels who had fenced stolen goods for him in the past (202, 271). Crawford testified that he had given Daniels permission to take stolen goods to his house but was unaware that Daniels was coming with this particular load (202, 283). In fact, Crawford was not home when Galvin and Daniels arrived with the hijacked truck (202). After Galvin backed the truck into Crawford's driveway, Daniels told Ingram to lie quietly on the floor and warned him that they would be watching him, and that he should not try to escape (345, 203). Galvin and Daniels partially unloaded the clothing from the truck into Crawford's garage² (204). After unloading the truck, Daniels drove the truck to a location in Queens, where he left Ingram in the truck warning him not to move for ten minutes (347).

Galvin had followed them and picked up Daniels after he left the truck. The two men then went to meet a third person, Al Holmes,³ and all three returned to Craw-

² The truck was never fully unloaded because the clothing could not all fit into the garage (204).

³ Al Holmes a co-defendant, whose case was severed before trial and is scheduled to be dismissed, was given several men's suits from the load as payment for helping to load the merchandise from the garage into Crawford's truck (207).

ford's house (205). By this time, Crawford had returned home and upon their arrival, he took Daniels aside and screamed at him for bringing the truck driver to his (Crawford's) house. Daniels assured Crawford that the driver had seen nothing because he had been wearing taped glasses, but Crawford retorted "Charlie, I can't take chances" (204). Crawford then told Daniels to remove the stolen merchandise from his garage and allowed Daniels to use one of his own trucks to move the clothing (284-285).

The next few hours were spent by Galvin and Daniels in a futile effort to find another "fence" (208). Finally, they drove the goods to a hotel where Arnie Sherman, a fence known to Galvin, told Galvin that he could get rid of the goods at a particular store located in Camden, New Jersey (209-210). The following morning, Galvin and Daniels went to Camden and unloaded the merchandise at the direction of a person who acknowledged that he had been contacted by Sherman (210).⁴ Galvin and Daniels returned to New York for payment by Sherman. Sherman however, offered only \$5000 due to the fact that the clothing had become wet while lying in the puddles in Crawford's garage. Daniels became upset and after argument, finally agreed with Galvin to accept the \$5000. The money was paid to them in cash and they split the proceeds evenly between them (211-216).

⁴ This individual, unidentified at trial, stated he did not want the bathing suits which were part of the load. However, after Daniels told him "it was all or nothing", he agreed to accept the entire shipment (211).

ARGUMENT

POINT I

Appellant Was Not Deprived Of The Effective Assistance Of Counsel.

Appellant claims that he was denied the effective assistance of counsel. Specifically he complains of the failure of his counsel Philip Brown, Esq., to: (1) request a pre-trial *Wade* hearing;⁵ (2) request charges on accomplice and immunized witness testimony; (3) object to an allegedly improper remark made by the prosecutor during summation; and (4) advocate appellant's cause at sentencing.

On the morning the jury was to be selected, following extensive colloquy concerning the applicability of the Interstate Agreement on Detainers, 18 U.S.C. App., a motion to dismiss the indictment for alleged pre-indictment delay, and other procedural matters, a recess was ordered by the Court to enable appellant to confer with his counsel. Following this recess, counsel asked to be relieved, stating that "at this time, as I feel that I don't think I enjoy the full confidence of this defendant" (31). Appellant then addressed the Court and stated his complaint which was, in essence, that he (Daniels) had had an opportunity to read "3500" materials turned over by the Government and shown to him only two days in advance of trial (33).

⁵ Thomas Ingram, the driver of the hijacked truck made an in-court identification of appellant as one of the hijackers. In addition Ingram identified for the jury a photograph of appellant that he had picked out of a photo spread shown to him about one year before trial. (350). Such testimony is, of course proper. Rule 801(d)(1)(C), Fed. R. of Evidence.

Recognizing that Mr. Brown "is certainly a highly skilled lawyer" who had "a proven track record in defending you" (34)—a previous hijacking case against appellant, who was then represented by Mr. Brown, had resulted in a mistrial, i.e., hung jury—the Court denied this motion (34, 59). Following other pre-trial matters, the jury selection began after the luncheon recess.⁷

Thereafter, at sentencing, appellant moved to have the verdict set aside, claiming that he had been inadequately represented at trial. In denying the motion, Judge Pratt, who had presided at the trial, stated:

"I observed the trial. I participated in some rather lengthy pretrial discussions, all of which are on the record. You did not make it particularly easy for Mr. Brown to represent you under the circumstances however. My view is that he did an effective job, both in the analysis of the case, in the cross-examination of witnesses, making objections

⁶ Interestingly, appellant concedes that his representation by Mr. Brown in the earlier case was adequate. (App. Br., p. 12). Therefore, the conclusion seems inescapable that it is the result which determined his satisfaction. We contend that the lame attempt to replace counsel on the morning of trial was nothing more than a stalling tactic by appellant, who had not hesitated to file numerous written motions. Not once in these papers did appellant hint that he was, in any manner, dissatisfied with Mr. Brown.

⁷ During this recess, appellant submitted additional hand written motion papers concerning an alleged violation of the Eastern District plan for the Prompt Disposition of Criminal Cases. This motion was simply denied since the six month period had not elapsed (96). But the significance of this motion is to demonstrate that, contrary to the characterization in Appellants Brief, (p. 12), he was not a frustrated individual "desperately" filing motions because of his lawyer's unwillingness to do so. Rather, he was constantly filing motions of a frivolous nature that *no* competent attorney would have made. And these motions did not stop; they were made before trial, after trial, and in a habeas corpus petition filed in the Southern District of New York.

when they were called for, he performed effectively as an officer of the Court in not making frivolous motions." *

We submit that there is ample evidence in the record to support this finding.

A complaint about counsel, coming as the Court noted not on the eve but on the very morning of trial (32), must be viewed with great circumspection. *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972); *United States v. Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967). Thus, in light of the Court's congested calendar (34) *United States v. Carroll*, 510 F.2d 507, 511 (2d Cir. 1975), and the suspiciously late and unsupported nature of the request for new counsel, denial of the request was not improper. There was no valid basis shown and to have granted the request, at that point, would have unnecessarily delayed the trial (59, 97, 98). But this is not really appellant's point. Rather, as stated above, he now claims that counsel's representation of him at trial was so inadequate as to constitute a denial of his Sixth Amendment right to the effective assistance of counsel.

It is conceded that in this Circuit the standard for determining whether counsel was inadequate was set forth in *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). "[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . . . A lack of effective assistance of

* Sentencing minutes, 1/27/77, pp. 11-12.

counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." Moreover, this standard has been reaffirmed "numerous times in recent years." *Rickenbacker v. Warden*, — F.2d —, Slip op. 1063, 1073 (2d December 22, 1976). See, e.g., *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), cert. denied, 417 U.S. 972 (1974); *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), cert. denied, 415 U.S. 991 (1974); *United States ex rel. Marcellin v. Mancuse*, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); *United States ex rel. Scott v. Mancuse*, 429 F.2d 104, 109 (2d Cir.), cert. denied, 402 U.S. 909 (1971); *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).⁹

Initially, appellant claims that his counsel should have requested a pre-trial *Wade* hearing to determine if the photo spread shown to and testified about by Thomas Ingram, the driver of the hijacked truck, was impermissibly suggestive. (App. Br. p. 13). We contend, as the record shows, that there was no colorable basis for suppressing identification of appellant. Indeed, appellant is unable to demonstrate that there was any such basis (Appellant's Brief p. 13-14). Since it would have been frivolous to have sought such a hearing, appellant cannot be said to have been prejudiced by the failure of his

⁹ We note that appellant suggests that if this standard is met then it should be reevaluated. (App. Br., p. 17). We contend, however, that this standard "uniformly . . . adhered to . . . over a period of three decades," *United States v. Taylor*, — F.2d —, slip op. 2805 (2d Cir., April 13, 1977) (Timbers, J., concurring op.), should not be discarded. Indeed, this argument, that the *Wight* standard should be revised, was rejected by the Court in the *Rickenbacker* case.

counsel to make such a motion. *United States v. Yanifshesky*, 500 F.2d 1327, 1331 (2d Cir. 1974); *United States v. Sanchez*, 183 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974). Moreover, it may well have been part of counsel's trial strategy to avoid a situation where Ingram would have had an opportunity to view appellant before the trial. Since Ingram had not seen appellant for over four years, counsel would choose to deny him an opportunity to strengthen his ability to identify appellant. However, even if that were not the reason, different approaches to trial strategy are not sufficient to support a claim that counsel was incompetent, Unless the action "was such as to make the trial a farce and a mockery of justice," *United States v. Wight*, *supra* at 379. *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974). Here, Ingram's identification testimony was strong since he had over three minutes to view appellant face-to-face in broad daylight (356-358, 384). Moreover, as is clear from the record, appellant's counsel conducted a thorough and searching cross-examination on this important point (*See, e.g.*, 358-359, 377-378, 384-385). Consequently, the identification was not a "farce and a mockery."

Appellant next argues that his counsel should have "pursued" the issue of pre-indictment delay in order to preserve the point on appeal since "this Circuit has not yet decided whether both elements in *Marion*¹⁰ are necessary to prove due process violation arising from pre-indictment delay" (App. Br., at 13). Thus, the claim is not that there was error, which as demonstrated below there was not; but, rather that counsel was somehow deficient because of his failure to raise an issue that might have been the basis for an appellate argument. Of course, this argument overlooks the fact that although

¹⁰ *United States v. Marion*, 404 U.S. 307 (1971).

this Court has stated in *United States v. Vispi*, 545 F.2d 328 (2d Cir. 1976) and *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975), that it has never squarely decided whether the *Marion* tests should be read in the disjunctive or the conjunctive, dictum in this Court indicates that both tests must be met. *United States v. Mejias*, — F.2d —; Slip op. 2269 (2d Cir. March 10, 1977); *United States v. Frank*, 520 F.2d 1287 (2d Cir. 1975); and *United States v. Brown*, 511 F.2d 920 (2d Cir. 1975). In the face of such authority, it can hardly be error, warranting reversal, for counsel to have failed to raise the *Marion* claim.¹¹

The crime in this case occurred in April 1972 and appellant was indicted in November 1975. However, the "delay" complained of was less than five months since the first "break" in the case did not come until almost mid-1975 (13). The break came when co-conspirator Chester Crawford first identified appellant as the hijacker in the instant case in May and June of 1975.¹² Soon thereafter on June 12, 1975, Ingram was shown a photo spread containing a picture of appellant for the first time. (Date on back of Govt. Ex. 3E). The agents had interviewed Ingram shortly after the hijacking (377), but he could only describe but not name the hijacker.

¹¹ And of course, there was no resultant prejudice since the motion was made below by appellant and counsel did argue the point. But, of even more significance, is that there is no claim asserted in this Court that denial of the motion to dismiss on the pre-indictment delay grounds was erroneous.

¹² Appellant correctly asserts that Crawford testified he was told in early 1974 or late 1973 that he would be a witness in this trial (286-287). However, the record reveals that Crawford apparently confused his cooperation in general with the information he gave in this specific case. Crawford gave information about many hijackings and testified in other cases (296). The only reports dealing with this specific hijacking were those of March 15, 1976 and June 6, 1975 (see Government's "3500-2", "3500"-3).

Appellant next contends that his trial counsel's failure to object to a remark made by the prosecutor during his summation further demonstrates the claimed inadequacy of representation at the trial. However, failure of trial counsel to object to a remark made by the prosecutor during summation, even if objectionable, hardly constitutes incompetency. *Rickenbacker v. Warden*, — F.2d —, slip op. 1063, 1073 (2d Cir., Dec. 22, 1976). In any event, in this case, the objected to remark was that the co-conspirators "had no motive to lie," when viewed in context was hardly error. The prosecutor stated that, in effect, since the co-conspirators already had immunity, the only way they could now get into trouble was to lie. Secondly, he pointed out that no motive had been shown for them to name appellant as their accomplice as opposed to anyone else. There is certainly nothing objectionable about these rather common prosecutorial arguments. Furthermore, such remarks hardly constitute putting the Government's "prestige" behind the witnesses as contended by appellant (App. Br. p. 16).¹³

¹³ The argument, in its entirety was:

Now, let's look at the immunity as related to motive. Immunity means that they are not going to be prosecuted for that crime or anything related to it except there is one way, and you heard that from Mr. Brown on cross-examination of Danny Galvin. And you heard it over and over and that is that if he sits in the witness chair and raises his hand and swears to tell the truth and then he lies, that's perjury and that's one way that he opens himself up to prosecution. Now he has a free ticket for this crime; I am sure that Mr. Brown will tell you that--except, if he commits perjury. He would have no motive to lie. There is no motive of these two men to lie. They're home free from this crime unless they got up there and lied to you. Secondly, let's look at the motive. This very motive: why name Charles Daniels? They didn't pick his name out of a phone book and say let's accuse him. (416-417).

In fact, the very next statement made by the prosecutor after the above-quoted remarks was:

Now, remember the Judge told you to base your decision on the evidence . . . (417).

A review of the record will show that after the prosecutor stated "there was no motive to lie", he then discussed the evidence in order to demonstrate why there was no such motive. Thus, the entire argument was based solely on the evidence, which was not distorted or misstated. Appellant, then, merely disagrees with the inference the prosecutor made, based on the evidence. This disagreement, however, does not make the remarks objectionable. See, *United States v. LaSorsa*, 480 F.2d 522 (2d Cir. 1973).

Appellant also claims that his representation was inadequate because of counsel's failure to object to the Court's instruction that appellant had subpoena power and could have called witnesses if he chose. (Appellant's Brief p. 15). However, given the fact that this charge was given after the jury had been admonished that the defendant need not put on any case at all (445-446), the "subpoena" charge was proper. *United States v. Brown*, 511 F.2d 920, 925 (2d Cir. 1975). With respect to the charge, appellant also contends that his counsel erred in not requesting charges on immunized and co-conspirator testimony. The failure to make such a request is not error since lawyers regularly differ as to the efficacy of certain charges. Thus, the co-conspirators charge is not mandated precisely because reasonable defense counsel can differ as to whether this charge, in a particular case is beneficial or not to a defendant. In any event, the jury was alerted to this issue, since counsel in his closing argument had emphasized the circumspect nature of co-conspirator and immunized testimony (*see, e.g.*, 430-431, 433-434).

Lastly, appellant alleges that his counsel failed to provide adequate assistance at sentencing. When appellant appeared for sentence, he told the Court that he did not wish to be represented by Mr. Brown and did not want to proceed *pro se*, but rather sought the aid of counsel with respect to various post-trial motions (Sentencing

Minutes, 1 28 77, pp: 4-5). The Court refused to adjourn the sentencing (*id.* at p. 18). Several adjournments had previously been granted and from the time of verdict to the day of sentencing, appellant had not once advised that he did not wish to be represented by Mr. Brown. This is particularly significant in view of the numerous written post-trial motions filed by appellant: in none of these was there a request that new counsel represent him at sentencing. But, even though, as the Court put it, "Brown . . . [was] not officially representing defendant, (*id.* at p. 17), Mr. Brown still argued vigorously and pleaded for leniency for appellant (*id.* at p. 3-4). Certainly, appellant was not deprived of the effective assistance of counsel at sentencing.

POINT II

No Resentencing Is Required Since All Of The Facts Relating To Appellant's Alleged Rehabilitation Were Before The Sentencing Judge.

Appellant asserts that since the sentencing judge did not have two memoranda (See App. Appendix D, E) before him at time of sentencing, the sentence should be vacated and the case remanded for resentencing before a different judge.

The memoranda relied upon by appellant had been written by a Joseph Mouzon, Senior Officer, and Mosie Coffee, Senior Officer Specialist, both correction officers at the Metropolitan Correction Center where appellant had been incarcerated for over a year. These memoranda, addressed to "whom it may concern" had been submitted to the probation authorities, but since the officers had not received authorization from the warden to forward such letters, they had not been included in the pre-sentence

report. (App. Br. p. 19*). Therefore, at time of sentencing, Judge Pratt had not seen the documents.¹⁴

Immediately after Judge Pratt announced appellant's sentence, appellant brought the memoranda to the attention of the court. At this time, Judge Pratt, who examined the documents, stated that the "tone" of the memoranda had been included in a letter submitted to him by the warden (Sentencing Minutes. 1/28/77, p. 21). Moreover, the Court suggested that appellant should submit the documents to him in connection with a motion to reduce sentence pursuant to Rule 35, Fed. R. Crim. P. (*Id.* at 22).

Even assuming *arguendo*, that the Probation Department should have submitted these unauthorized memoranda to the court, it is evident from comparing them (App. Appendix D, E, F) with the warden's letter (App. Appendix G) that the information contained in them was before the court. Warden Taylor evaluated the record achieved by appellant since he had been confined at the Metropolitan Correction Center and set forth the disciplinary problems that appellant initially caused. He then wrote:

However, since June, 1976 Mr. Daniels' behavior markedly improved. He has worked on his Unit Sanitation detail for which he receives a monthly Performance Pay and he has received numerous letters from our staff members, including myself, stating our appreciation for Mr. Daniels' assist-

¹⁴ Each memorandum set forth details concerning appellant's institutional adjustment, including the details of an incident during which appellant had assisted Officer Mouzon in saving the life of another inmate. As noted below, this information was contained in a letter forwarded to the Court by the warden, which letter was considered by the court in imposing sentence.

ance in saving the life of another inmate at the Metropolitan Correctional Center. Other staff members have stated their appreciation of Mr. Daniels for his spirit of involvement with other inmates and staff and for his constructive attitude toward self-improvement. Since June, 1976, Mr. Daniels has not been a control problem nor has he had any Incident Reports.

Mr. Daniels continues to enjoy regular visits from his wife and mutual friends. He spends his free time using our recreational facility and working on his case. He now enjoys a good relationship between staff and fellow inmates.

Mr. Daniels has talked with our staff about his past control problems and he feels he has worked them out. He has not indicated that he wants any formal counseling or structured behavioral therapy. Upon release, he plans on returning to work and living with his wife.

Should you have any further questions about Mr. Daniels, please feel free to contact me.

Sincerely yours,

Larry F. Taylor
Warden

Appellant points to only two differences between this letter from Warden Taylor, which was before the Court, and the memoranda. First, he states that the letter, unlike the memoranda, discussed appellant's initial disciplinary troubles. (*Id.* at 22). Since appellant cannot and does not challenge the accuracy of that portion of the warden's letter, he cannot complain that he was prejudiced by the court having before it a full picture of his institutional adjustment.

The only other difference between the memoranda and the warden's letter, as pointed out by appellant, is that Warden Taylor did not set forth his subjective judgment of appellant's character and his prospects for rehabilitation as was stated by the correctional officers. (*Id.* at 22). Appellant, however, does not establish the expertise of the officers to make such evaluations. Nor does he show how this would have been crucial to the determination of an appropriate sentence. Indeed, what is important is that the incidents and objective data which supported the conclusions of these corrections officers were indeed detailed in the warden's letter which the Court stated it had "carefully" read. (Sent. Min., 1/28/77, p. 21).

In view of the fact that the pertinent information contained in the memoranda was already before the Court, we contend that it can hardly be said the omitted material was of "unique importance". *United States v. Robin*, 545 F.2d 775, 781 (2d Cir. 1976).

This case, then, is far removed from those cases where resentencing was deemed to be warranted due to a sentencing court's reliance on significant erroneous information. See e.g., *United States v. Tucker*, 404 U.S. 443 (1972) (court relied upon a constitutionally invalid earlier conviction); *Townsend v. Burke*, 334 U.S. 736 (1948) (inaccurate criminal record); *United States v. Stein*, 544 F.2d 96, 102 (2d Cir. 1976) (allegations that defendant tried to fix a previous sentence and that he faked a suicide while awaiting sentence); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970). (Inaccurate criminal record). Nor did the sentencing Court rely on damaging allegations contained in a document not revealed to appellant *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974).

Nor did the Court prevent appellant from pointing out discrepancies in the pre-sentence report *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973), or deny appellant sufficient time to rebut damaging allegations. *United States v. Robin, supra*, 545 F.2d at 780. Nor was this a case where the Court withheld a probation report which contained significant information favorable to appellant. *United States v. Stein, supra*, 544 F.2d at 103. The extent to which appellant was rehabilitated and the extent of his assistance to prison officials was fully known to the Court at sentencing.¹⁵ Hence, the Court was not laboring under a "false material assumption" (*United States v. Malcolm, supra*, 432 F.2d at 816) that appellant had shown no rehabilitative progress.

Thus his argument is essentially one of dissatisfaction with his sentence. However, the sentence was well within the maximum penalty provided by the law. This being the case, the sentence should not be vacated.

¹⁵ It should also be noted that the sentencing court had, significantly, been the trial judge at appellant's trial. *United States v. Robin, supra*, 545 F.2d at 780-781.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
May 18, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.
225 Cadman Plaza East,
Brooklyn, New York 11201

BERNARD J. FRIED,
DAVID GOULD,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23 day of May 19 77 he served a copy of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Legal Aid Society, 509 U.S. Courthouse, Foley Square, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

23rd day of May 19 77

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41-1618228

Qualified in Queens County
Term Expires March 31, 1979